



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: MAY 15, 2023

IN THE MATTER OF:

Appeal Board No. 628639

PRESENT: MARILYN P. O'MARA, MEMBER

The Department of Labor issued the initial determination holding the claimant eligible to receive benefits. The employer requested a hearing and objected contending that the claimant should be disqualified from receiving benefits because the claimant lost employment through misconduct in connection with that employment and that wages paid to the claimant by such employer should not count in determining whether the claimant files a valid original claim in the future.

The Administrative Law Judge held a telephone conference hearing at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed March 16, 2023 (), the Administrative Law Judge overruled the employer's objection and sustained the initial determination.

The employer appealed the Judge's decision to the Appeal Board.

Our review of the record reveals that the case should be remanded to hold a hearing. Initially, we find that the employer had indicated to the Department of Labor that the factual incident resulting in the claimant's separation from employment was a no call/no show on two consecutive days which included October 28, 2022. We, therefore, find good cause to consider whether the claimant was discharged for being no call/no show on October 28, 2022 and October 29, 2022 in violation of a known company policy. However, there is a dispute by the parties regarding the details of the incidents, including phone calls, texts and email communications between the claimant, the general manager, Matthew Burnham, and keyholders Dennis and Adam. The employer should

again produce Matthew Burnham to testify further regarding the details of the separation. In addition, the employer should produce keyholders Dennis and Adam to testify regarding any calls they received from the claimant on October 28, October 29 and/or October 30, 2022. In this regard, both parties should also produce telephone records for October 28, 2022 through October 30, 2022. Should either party experience difficulty in obtaining these records, the party should immediately contact the Hearing Section to obtain a subpoena for the purpose of obtaining the telephone records. Lastly, the claimant should produce documentation regarding the date of the funeral of his grandmother. The telephone records and the documentation regarding the funeral of the claimant's grandmother shall be accepted into the record after appropriate confrontation and opportunity to offer objections to their entry.

Now, based on all of the foregoing, it is

ORDERED, that the decision of the Administrative Law Judge be, and the same hereby is, rescinded; and it is further

ORDERED, that the case shall be, and the same hereby is, remanded to the Hearing Section to hold a hearing, upon due notice to all parties and their representatives; and it is further

ORDERED, that the hearing shall be conducted so that there has been an opportunity for the above action to be taken, and, so that at the end of the hearing, all parties will have had a full and fair opportunity to be heard; and it is further

ORDERED, that an Administrative Law Judge shall render a new decision, on the issues, which shall be based on the entire record in this case, including the testimony and other evidence from the original and the remand hearings, and which shall contain appropriate findings of fact and conclusions of law.

MARILYN P. O'MARA, MEMBER